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No. 332

In the Supreme Court of the United States

OCTOBER TERM, 1969

GERARD E. BERNE, PETITIONER

v.

GOVERNMENT OF THE VIRGIN ISLANDS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
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OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1969. A petition for rehearing *en banc* was denied on June 12, 1969. The petition for a writ of certiorari was filed on July 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner voluntarily and intelligently consented to a seizure of various articles of clothing in his car.

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2. Whether there was prejudicial error in the giving of an *Allen* instruction prior to the time the jury first retired for deliberation.

3. Whether the government deliberately concealed evidence favorable to the defense.

STATEMENT

After a jury trial in the District Court of the Virgin Islands, petitioner was convicted of rape in the first degree, in violation of 14 V.I.C. 1701(3). He was sentenced to five years' probation, on condition that he serve one year in jail. The court of appeals affirmed, one judge dissenting (Pet. App. B).

The sufficiency of the government's evidence with respect to the commission of the crime is not in dispute. The victim, Miss Walsh, a twenty-year old girl who was on vacation with some friends, testified that she met petitioner at a nightclub in Charlotte Amalie on the evening of May 16, 1968. After agreeing to drive her home, petitioner instead drove to a remote area and began making advances. Miss Walsh got out of the car and ran to a beach where she attempted to elude petitioner by swimming out to sea. Petitioner overtook her and brought her back to the beach. Brandishing a knife, petitioner compelled Miss Walsh to remove her clothing. He then began to have sexual intercourse with her (and achieved penetration) but stopped after a car came by. Petitioner gave Miss Walsh a pair of trousers and a jacket to wear and drove her to her hotel (Tr. 127–170).[1]

[1] "Tr." refers to the transcript of proceedings at trial, a copy of which we are lodging with the Clerk of this Court.

A friend who had been staying with Miss Walsh testified that when she came home she was upset. Upon being asked by another girlfriend whether she had been raped, she replied "yes" (Tr. 274–276). A physician, Dr. Yoon, testified that he was called to the hotel about 5:30 a.m. After examining Miss Walsh he concluded that there was a probability that violence had been inflicted upon her sexual organ but he could not positively say there had been penetration (Tr. 99–103).

Between 5:00 and 6:00 a.m. two police officers went to the Caribbean Beach Hotel where Miss Walsh was staying. After talking with Miss Walsh for about an hour, they proceeded to petitioner's home (Tr. 237–238). The officers arrived there about 7:00 a.m. and were met at the door by petitioner's mother. At their request petitioner was summoned and the officers motioned him aside. They asked where his car was parked. He said it was parked at the airport lot about a hundred yards away, and at their request he accompanied them there in a police car (Tr. 238–239, 247). One of the officers (Norman) told petitioner (Tr. 239–240):

> that [he] had spoken to the young lady at the Caribbean Beach Hotel and she stated that she was out with a person in this particular make car [2] and she described you down to a T, that's the slang, and I asked him did he have any clothes belonging to this young lady and he said, "Yes." I asked him where it was and he said it was in the trunk of the car. He then

[2] Petitioner testified that the car, a yellow MG, was unique on the Island.

went in the trunk of the car and took clothes out of the car and gave me.

Norman denied ordering petitioner to get the clothes (Tr. 247–248). He testified that the officers gave petitioner no warning at that point. Petitioner handed the officers Miss Walsh's town dress, girdle and panties, which were subsequently introduced into evidence at the trial (Tr. 243, 252–253). Thereafter another officer drove up in a police car (Tr. 253–254). Petitioner was not arrested at that time (Tr. 245).[3] Later that morning, around 11:00 a.m., petitioner went with his father to the Caribbean Beach Hotel to try to see Miss Walsh. He was then arrested and taken to the police station. He was informed of his constitutional rights under *Miranda* v. *Arizona*, 384 U.S. 436, and signed a form indicating that he understood them (see Pet. App. B, 5 nn. 3–4). Thereafter petitioner was asked where his knife was located. He replied that it was in his car and offered to take the officer there. Detective Hodge accompanied petitioner to his car. Petitioner gave him the knife (Tr. 62–63, 306), which subsequently was introduced into evidence.

ARGUMENT

1. Petitioner contends that the initial search by the police resulting in the seizure of articles of clothing

[3] Petitioner testified that he had not had much sleep when the officers arrived and was feeling "hazy." He stated that he was *told* by the officers to get Miss Walsh's clothes from the trunk and that they took the clothes after he opened the trunk. He indicated that while on the scene the police advised him that he would be charged with rape. He was unaware that the police could not search his car without a warrant unless he consented and did not wish his car to be searched (Tr. 47–52, 56–59).

of the victim was unlawful because he did not voluntarily and intelligently consent to the search and was not given a warning of his Fourth and Fifth Amendment rights prior thereto. The issue is thoroughly canvassed in the opinion of the majority below, on which we rely. We submit there is no reason for this Court to review the basically factual determination of the majority below that petitioner was not in custody when he accompanied the officers to his car. This finding is the predicate for the court's holding that no *Miranda* or other warnings were required in order to obtain petitioner's valid consent. See *United States* v. *Vickers*, 387 F. 2d 703 (C.A. 4), certiorari denied, 392 U.S. 912.

We also point out that the clothing seized in the first search was not critical evidence on the issue of whether a rape had occurred. Petitioner did not deny having Miss Walsh's clothing in his car. He testified that Miss Walsh consented to sexual relations (which did not reach the stage of intercourse) with him on the beach and left her wet clothes in the trunk of his car on the understanding that he would have the torn dress taken to a seamstress the following day (Tr. 571–584). The jury's verdict could thus not have been affected by the introduction of the seized items of clothing.

2. Before the jury initially retired for its deliberations, the trial court gave the following instruction, the second portion of which was objected to:

> You are instructed that every juror is entitled to his own opinion and should not yield to the opinion of other jurors, unless he him-

> self is convinced to a moral certainty that the defendant is guilty of the crimes charged against him.
>
> * * * * * *
>
> You are instructed that it is the duty of each juror to reason with his fellow jurors to the end of joining in the verdict; you are instructed that no juror should refuse to agree from mere pride of opinion; you are instructed that if a juror should find himself in the small minority he should ask himself whether the fact that the majority differ with him does not indicate that his own doubt is not a reasonable one or that his conclusions, one way or the other, are not correct [Tr. 756, 760–761].

This instruction was based on this court's decision in *Allen* v. *United States*, 164 U.S. 492; see *Kawakita* v. *United States*, 343 U.S. 717, 744 (where the Court found an *Allen* charge claim, *inter alia*, "either insubstantial or so adequately disposed of by the Court of Appeals that we give [it] no notice"; see, for the opinion below, 190 F. 2d 506, 521–528 (C.A. 9)). The courts of appeals until recently also were unanimous in approving such instructions. See *Fulwood* v. *United States*, 369 F. 2d 960 (C.A.D.C.), certiorari denied, 387 U.S. 934 and cases cited. Since in those cases the courts have held that the giving of such a charge is not coercive when the jury is deadlocked, then *a fortiori* such a charge is not coercive where given as part of the court's general instructions.

The Third Circuit has recently held, in the exercise of its supervisory powers, that it will no longer con-

tinue to approve the typical *Allen* charge. *United States* v. *Fioravanti*, No. 17398, decided June 16, 1969, petition for a writ of certiorari pending *sub nom. Panaccione* v. *United States*, No. 333, this Term. A similar rule has been adopted in the Seventh Circuit in *United States* v. *Brown*, No. 16772, decided June 6, 1969, petition for a writ of certiorari filed, No. 551 Misc., this Term. In both *Fioravanti* and *Brown*, however, the courts did not find the giving of the *Allen* charge to require reversal of the conviction. There is thus no inconsistency in the decisions of the Third Circuit and no conflict of decisions.

3. Petitioner also contends that the government violated *Brady* v. *Maryland*, 373 U.S. 83, by deliberately concealing evidence favorable to the defense. Specifically the claim is that the government wilfully failed to inform the defense of the existence and identity of a doctor, not produced at trial, who had examined Miss Walsh and made the statement that it was impossible to determine whether she had been raped (Pet. 3). At the trial, Miss Anderson (a friend of the victim) and Miss Walsh testified that a Doctor Wilson from Long Island made an examination of Miss Walsh immediately after that made by Dr. Yoon (Tr. 222–223, 287). Dr. Wilson told Miss Walsh that it was "more likely" than not that she had been raped, but he was "not sure" (Tr. 223). Miss Anderson testified that Dr. Wilson never told her that it was impossible to determine whether Miss Walsh had been raped (Tr. 285–286). She indicated,

however, that Dr. Wilson was in Miss Walsh's room for some part of the time while the police were there (Tr. 287–288).

Petitioner introduced testimony of a defense investigator that he had spoken with Miss Anderson in New York. She told him that she was in the room when Dr. Wilson made his examination, and that the doctor had stated that it was impossible to determine whether there had been penetration (Tr. 649).

The above facts are insufficient to establish any violation of a duty of disclosure by the prosecution. There was no showing made that the prosecution ever knew of Dr. Wilson or his opinion (see Tr. 32–33). The police apparently did not report his existence. Detective Hodge, who was told by one of the girls at the hotel that Miss Walsh had been examined by another doctor, made no attempt to ascertain the other doctor's identity (Tr. 320). Dr. Wilson's testimony at most would have been corrobative of that of Dr. Yoon, who testified that he could not determine with certainty whether penetration had occurred (see *infra*, p. 3).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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